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No. 94-2137

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GENERAL MOTORS CORPORATION,

Petitioner,

v.

JACK FRENCH, ROBERT M. WEST, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Before turning to respondents' treatment of the legal issues presented for review here, it is necessary to dispose of two initial objections that they raise.[1]

First, respondents argue that the Court should duck these issues because they have arisen in an interlocutory posture. French Opp. 14. They do not contend that this point defeats the Court's jurisdiction, but offer it merely as a prudential consideration in deciding whether to grant review. The legal issues here, however, concern the prerequisites that are involved in obtaining *a judicial determination whether to*

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[1] Two distinct sets of parties filed as respondents; although generally there is no need to distinguish between them, their filings will be specifically cited as "French Opp." (for the French respondents) and "Gov't Opp." (for the Pennsylvania and other government respondents).

accept or reject a class action settlement. When, as in this case, a court of appeals overturns a settlement that had been approved by the trial court, the pertinent legal issues cannot be presented in any other procedural posture. Moreover, nothing can occur in any subsequent proceedings in this case that will shed further light on this issue, which the Third Circuit has definitively resolved as the law of this case unless addressed by this Court at this time. *Cf. Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir.), *cert. granted in part sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 115 S. Ct. 2576 (1995) (review granted on full faith and credit issue, after appeals court had reversed and remanded the case for further proceedings).

The weakness of respondents' argument on this point is shown most emphatically by the Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In that class action suit, the District Court issued an order refusing a joint motion to approve a settlement that had been negotiated between the parties. The Court of Appeals dismissed on appeal for want of jurisdiction, but this Court reversed, holding that appellate review was appropriate in that interlocutory posture. The rationale for the Court's holding—that the District Court's refusal to approve the settlement had "radically affected" the necessary "condition of settlement" that "the parties would, by their agreement, be able to avoid the costs and uncertainties of litigation," *id.* at 87—is especially significant here:

> [In this case,] the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court. Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, *the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their right to compromise their dispute*

on mutually agreeable terms.

Id. at 87-88 (emphasis added; footnotes omitted). The Third Circuit's ruling in this case has these very same consequences.

Second, respondents contend that because the Advisory Committee is in the process of reviewing Fed. R. Civ. P. 23, the Court should decline to address any issues involving class actions until that process has run its course. French Opp. 14-15. This contention simply cannot be accepted at face value. Of course, every one of the Federal Rules—whether of Civil Procedure, Criminal Procedure, Appellate Procedure, or Evidence—is currently under review, for it is widely advertised that they are constantly under review by the Advisory Committee members, who meet at least twice a year for this purpose. The Court (which, along with Congress, is the arbiter of amendments and revisions to the Federal Rules) nonetheless finds it proper to grant plenary review in appropriate cases that involve the application of those rules. *See, e.g., Tome v. United States*, 115 S. Ct. 696 (1995) (Fed. R. Evid. 801); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (Fed. R. Civ. P. 11).[2]

2. The Third Circuit recognized in this case that it was deciding a purely legal question of great national significance, on which the court openly acknowledged its disagreement with other lower courts and the leading treatise on class actions. App. 52a-53a, 57a-58a. That principal question is whether courts can and should construe Rule 23 to encourage the settlement of class actions without first requiring parties to engage in what typically becomes protracted litigation over the

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[2] The situation might be different had respondents identified some specific revision in the text of Rule 23 that addressed or transformed the issues raised in this case, but they offer none. Indeed, petitioner has been informed that the very revisions to Rule 23 cited by respondents here, which have been pending for several years, are in the process of being withdrawn. New revisions will then be proposed, and the process will continue. But the Advisory Committee's activities should not paralyze this Court by preventing it from undertaking to resolve important questions concerning the proper interpretation and application of Rule 23 or any other Federal Rule.

preliminary issue of class certification. Many courts have recognized that the issue is profoundly important, for if class actions cannot be settled without first obtaining a judicial determination that the formal requisites for certifying a *litigation class* have been met, then the established public policy favoring the voluntary resolution of disputes will be seriously frustrated. *See* Pet. 17-21 (discussing the cases).[3]

The Third Circuit itself expressly stated that its holding on this issue was in conflict with the position taken by the Second and Seventh Circuits. *Id.* at 52a-53a. The court analyzed both *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), and *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677 (7th Cir. 1987), and concluded that both courts had held that "a fairness determination is a surrogate for Rule 23 findings." App. 52a-53a.[4]

Respondents go to great lengths to disagree with the Third Circuit's candid acknowledgment of the circuit split on this issue. They inexplicably claim that *Weinberger* "does not hold—or even suggest—that a finding of fairness can serve as a substitute for class certification," French Opp. 18, but the Third Circuit more accurately summarizes the case as holding that a fairness determination "substitutes for Rule 23 findings."

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[3] Although both sets of respondents find solace in the fact that an intermediate Texas court has reversed a trial court ruling on similar grounds, *see* Gov't Opp. 14; French Opp. 2, that tangent is irrelevant to this Court's review. Indeed, in the Texas proceeding (as here) the two courts to consider the matter so far have disagreed, and the matter is currently under review by a third—the Texas Supreme Court, which has thus indicated that it recognizes the importance of the issues raised for state class action suits brought in every realm of state law. *This* consideration, by contrast, is extremely relevant here.

[4] It is disingenuous for respondents to represent that the Third Circuit treated the holdings in *Weinberger* and *Mars Steel* as nothing more than "suggestions." French. Opp. 15. On the contrary, the court clearly stated: "We disagree *both* with this suggestion *and with the conclusion* that a fairness determination is a surrogate for Rule 23 findings." App. 52a-53a (emphasis added).

App. 52a-53a (citing *Weinberger*, 698 F.2d at 73). Similarly, whereas the Seventh Circuit in *Mars Steel* explicitly *upheld a class settlement without formal findings on the issue of class certification*, respondents contort the clear thrust of the decision by playing up its supposed "caveat[s]," "lament[ations]," and "impl[ications]" at the expense of its actual holding. French Opp. 18; Gov't Opp. 7, 8. *But see* App. 52a.

Respondents also do not address in any convincing way the Third Circuit's considered statement that "while some other courts have nominally complied with the rule, they appear to have assumed that lower standards apply in settlement class cases." App. 58a (discussing, *inter alia*, *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); and *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987)). Respondents are content to note that these cases do not "support the proposition that Rule 23's certification requirements can be ignored for settlement classes." French Opp. at 15. But this misses the point. The two cases that stand directly for *that* proposition are *Weinberger* and *Mars Steel*. Both petitioner and the Third Circuit would concede that these cases at least "nominally compl[y] with" Rule 23, yet would stress that they undermine their compliance by appearing to assume "that lower standards apply in settlement class cases." App. 58a. Whether or not the ultimate result is characterized as *actual* compliance with Rule 23 is less pertinent here than the recognition that the lower courts are marked by substantial disarray in their approaches to this important issue.

By laboring to paint the canvas with such a fine brush, respondents miss the main points that this Court must confront in deciding whether to grant *certiorari* here. It is undeniable that the Third Circuit consciously and conspicuously "rendered a decision in conflict with the decision of another [Circuit] on the same matter." Sup. Ct. R. 10.1(a). And respondents never

deny that this issue, which squarely affects every class action in which settlement negotiations may be pursued, poses "an important question of federal law which has not been, but should be, settled by this Court." *Id.* 10.1(c). Indeed, though respondents argue that the Third Circuit's position is consistent with this Court's decisions in *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), they do not explain how it can be squared with the Court's admonition in *Evans v. Jeff D.*, 475 U.S. 717 (1986), that Rule 23 should not be interpreted to "reduc[e] the attractiveness of settlement," thereby "forcing more cases to trial, unnecessarily burdening the judicial system, and disserving . . . litigants." *Id.* at 732, 736-37. The difficult task of reconciling these decisions, and ensuring that the lower courts have not "decided a federal question in a way that conflicts with applicable decisions of this Court," cannot be performed by any other tribunal. Sup. Ct. R. 10.1(c).[5]

3. A related question addressed below concerns the proper standards courts should apply in assessing the fairness of class settlements, and the extent to which reviewing courts should defer to trial court determinations in this regard. On these points, respondents concede that the lower courts have "used somewhat different language in evaluating such settlements." French Opp. 21. They nonetheless argue that since the lower courts universally apply a general standard of assessing whether any proposed settlement is "fair, adequate, and reasonable," there is no valid circuit split on this issue. *Id.*; Gov't Opp. 11.

This reasoning is entirely specious. One might just as easily argue that the Court never would be justified in deciding any search-and-seizure cases under the Fourth Amendment

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[5] Nor are respondents justified (French Opp. 20) in criticizing petitioner for not presenting a merits brief at this stage. The point here is simply that these questions are important enough to warrant review.

because all the courts agree that the overarching legal standard is whether police conduct was "reasonable." The real issue, however, is whether the lower courts have devised more specific tests to give content to such general formulations, and whether those tests differ from one court to another. *See, e.g., Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (resolving conflict among lower courts over "knock and announce" rule developed in applying the Fourth Amendment).

Respondents acknowledge, rather grudgingly, the salience of both points here. Indeed, they succinctly describe part of the circuit split when they identify "a nine factor test as prescribed by the Third Circuit, a six factor test as used by the Fifth Circuit, . . . or a standard with no specifically delineated subparts [Seventh and Second Circuits]." Gov't Opp. 11. Although respondents suggest that there is substantial inconsistency even within Circuits about how deferentially these standards should be applied, *see* French Opp. 21-23, that only magnifies the need for uniform guidance from this Court about how to approach the fairness determination.[6] In the end, respondents are reduced to offering the strikingly uninformative comment that all the Circuits approach this issue in the same manner insofar as they "review the district court's discretionary ruling on the evidence in the record, with all reasonable inferences arising from the record." Gov't Opp. 11. This is hardly a judicial approach that can serve to ensure even modestly consistent treatment of class action settlements from one Circuit to the next.[7]

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[6] In this respect, the fact that the Third Circuit has occasionally upheld settlements (French Opp. 22-23) has no bearing on the issues here either. Instead, it simply reflects the obvious truth that any of the various standards and sets of factors applied by the lower courts will likely be met in some cases and not in others.

[7] Indeed, if this abstract formulation sufficed to obviate the need for uniform resolution of all such issues, then the Court had no need to decide its influential trilogy of summary judgment cases under Rule 56. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty*

(continued...)

Surprisingly, respondents do not even attempt to address the vast difference in approach between the Third Circuit's more structured balancing of numerous factors in deciding whether to uphold a class settlement, and the sharp limits upon this inquiry laid down by the Sixth and Ninth Circuits. Those courts have strongly stated that class settlements are not to be "trifled with" in the absence of evidence of fraud or collusion. *Granada In[illegible]c. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Officers for Justice*, 688 F.2d at 625 (judicial "intrusion upon what is otherwise a private consensual agreement negotiated between the parties" is limited to ensuring "that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties"); *see also* Pet. 24-25. Respondents' failure to discuss the approach taken in these cases to approving class settlements belies their claim that the lower courts are essentially in accord on this issue.

4. Finally, petitioner is criticized for discussing in the petition how the court below overstepped the boundaries of its proper role in reviewing factual findings entered by the District Court, an issue that some respondents suggest is not properly before the Court. French Opp. 24.[8] This charge is incorrect. Although petitioner did not think this issue merited plenary review, standing alone, it certainly is proper to raise the point

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[7] (...continued)
Lobby, Inc., 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[8] The other respondents do not appear to agree with this suggestion, for they discuss at length their complaints about how the proposed settlement was unfair to "government fleet owners," even though they declined to exercise their right to opt out of this case. Gov't Opp. 12-13. Like the Third Circuit, however, they simply fail to extend proper deference to the *factual* findings made by the District Court that alternatives can be structured to surmount initial constraints posed by competitive bidding requirements and, more crucially, that a secondary market would develop for transferred certificates. *See* App. 126a-129a, 132a-133a; *cf. id.* at 81a-83a. The latter finding, in particular, was based on unrebutted expert testimony. *See id.* at 83a, 127a.

under Sup. Ct. R. 14.1(a), for the issue of how reviewing courts should treat trial court findings is clearly a "subsidiary question" to the larger question of how "trial courts and appellate courts" should go about "determining whether to approve a class action settlement reached by the parties." Pet. at i (Question II). Petitioner thus renews its suggestion that if review is granted here, it would be useful both to class action litigants and to the lower courts for the Court to offer guidance in this regard.

Respondents take considerable liberties with the facts, ignoring substantial contrary evidence that the District Court had correctly found to weigh heavily in favor of approving the settlement. *See* French Opp. 25-27; Gov't Opp. 12-13; *see also supra* note 8. Indeed, respondents apparently do not find the Third Circuit's treatment of the factual issues to be entirely satisfactory, for they repeatedly cite *other* evidence in the record that was neither found persuasive by the District Court in arriving at its factual findings nor mentioned by the Third Circuit in departing from those findings (which were never overturned as being clearly erroneous). With respect to Dr. Simonson's unrebutted expert testimony on valuation, for example, which was depreciated by the Third Circuit primarily on the basis of mere speculative possibilities, respondents point to survey results and the actions of a coupon-trading company that were not even discussed by the Third Circuit. French Opp. 25.[9]

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[9] On the retrofit issue, to take yet another example, respondents opine that the "cost of repair was a viable measure of damages, the court of appeals held, particularly because petitioner itself tested the three retrofits proposed by objectors and found that each would improve safety." *Id.* at 26. The Third Circuit *actually* said: "It is true that there does not appear to be a consensus retrofit . . . there was evidence that [each of the suggested retrofits] was either ineffective or caused other performance problems." App. 85a. Although the Third Circuit found the evidence about retrofit to be mixed at best, it nonetheless reflexively disapproved the District Court's factual findings on this point. *Id.*

In sum, though petitioner and respondents can be expected to take quite different views of the facts, the whole point here is that our judicial process leaves it within the province of the trial court to reach a definitive resolution of those differences, which is not to be set aside unless clearly erroneous.

5. That point, however, concerns only the narrower issue of factual review. The principal legal issues posed here are of broader significance and warrant resolution by this Court. In the class action context, in particular, disagreements among lower courts on such fundamental issues are intolerable because forum shopping is so easy in cases that involve a class membership of any significant size.

Finally, it bears emphasis once again that because the vast majority of all legal claims—including those asserted in class action lawsuits—are resolved by compromise and dismissal, the settlement of class action suits is a matter of great and recurring importance to courts and citizens alike. This Court has never addressed any of the difficult issues raised in this context, other than in cases involving awards of attorneys' fees. The two principal issues raised in this case and addressed by the court below inevitably have a powerful impact on *every* federal class action suit in which the parties may seek to negotiate a proposed settlement.[10] They are deserving of review here.

CONCLUSION

For these reasons, as well as those set out at more length in the petition, a writ of *certiorari* should be granted.

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[10] Respondents' passing observations that these two legal issues present alternative bases for the Third Circuit's holding, *see* French Opp. 14; Gov't Opp. 13, are beside the point here because petitioner urges the Court to grant review and address the merits of *both* issues, each of which is properly presented on the facts of this case.

Respectfully submitted,

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